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Supreme Court of the United States

No. 21, Original—October Term, 1929.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY, et al.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

Supreme Court of the United States

No. 21, Original—October Term, 1929.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY, et al.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR THE ISSUANCE OF A FORMAL WRIT OF MANDAMUS.

On December 24, 1929, petitioners filed with the clerk of this court a motion entitled "Motion for the Issuance of a Formal Writ of Mandamus," dated December 20, 1929, and a brief in support of the motion. Copies of the motion and brief were furnished counsel for respondents herein. Thereupon Judge Bourquin filed another order, dated December 26, 1929, a certified copy of which, together with an affidavit of M. S. Gunn, one of the attorneys for petitioners in the proceeding in this court, was filed with the clerk of this court by counsel for petitioners. The order of December 26, 1929, reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MONTANA.

No. 692.

Northern Pacific Railway Co., et al.,
Plaintiffs,

vs.

Board of Railway Commissioners, et al.,
Defendants.

Herein, it having been by counsel for defendants brought to the court's notice that though the court on December 14, 1929, in the presence of counsel for both parties, (M. S. Gunn for plaintiffs) made an order amongst other things to convene a statutory 3-Judge court on January 25th, 1930, to hear all matters proper therefor, the order inadvertently and by implication treated the cause as pending although theretofore dismissed, to which no objection to any part was by any counsel made,

It is now ordered that the decree of dismissal of the suit by Bourquin, J., heretofore made, be and hereby is vacated as of December 14th, 1929.

C. R. GARLOW, Clerk.

Entered in open
Court, Dec. 26, 1929.
Attest a true copy:
C. R. Garlow,
Clerk.
(SEAL)"

The affidavit of M. S. Gunn reads as follows:

(Title of Cause)

"STATE OF MONTANA,
County of Lewis and Clark—ss.

M. S. Gunn, being duly sworn, deposes and says: That he is one of the solicitors for the Northern Pacific Railway Company and the Chicago, Burlington & Quincy Railway Company, two of the plaintiffs in the above entitled cause; that he has read the order made and entered in said cause on the 26th day of December, 1929, a copy of which is hereto attached and made a part of this affidavit; that on the 14th day of December, 1929, and at the time of the making of the order in said cause by United States District Judge Bourquin with reference to a statutory court and the hearing of the application for a temporary and final injunction, he was present in said United States District Court for the purpose of a hearing of a motion to modify a decree in another case which had been noticed for hearing that day, and in which case he was solicitor for one of the parties; that he had no notice that any order would be made in the above-entitled cause and at the conclusion of the hearing had to modify said decree, as aforesaid, United States District Judge Bourquin made said order in the above-entitled cause and directed the Clerk to enter same; that at the time affiant did not know that the decree dismissing said cause had not been vacated, but later, upon inquiry in the office of the Clerk of said Court, was informed that no order vacating said decree of dismissal had been made.

M. S. GUNN.

Subscribed and sworn to before me this 27th day of December, 1929.

A. A. MAJOR,
Notary Public for the State of Montana.
Residing at Helena, Montana.
My commission expires Feb. 28th, 1931."

(Notarial Seal)

(Copy of order attached)

Judge Bourquin's order of December 26 makes no change in the situation, for in petitioners' motion no great stress was laid upon the fact that Judge Bourquin inadvertently failed to comply with the rule made absolute by this court on December 2, 1929. Petitioners suggest in their prayer that this court may "consider the order made by Judge Bourquin on December 14, 1929, a substantial compliance with the requirement of the rule that he 'annul and set aside the order and decree of May 31, 1929, dismissing the petitioners' bill of complaint.' "

The statement that the order of December 14 was made in the presence of counsel for both parties is misleading for the reasons set forth in the affidavit of M. S. Gunn. It was merely a coincidence that Mr. Gunn, who represents in the District Court but two of the plaintiffs, happened to be in court when Judge Bourquin made his order of December 14. As to the failure of Mr. Gunn to make any objection to the order, we submit that when this court has, in plain language, told a district judge to do a certain thing it is not the duty of counsel to register an objection with that judge when he fails to act as directed. Moreover, if the district judge is unwilling to follow the directions of this court, he is not likely to heed the objections of counsel.

Nevertheless, because Judge Bourquin in his order of December 26 says no objection was made by counsel, and to avoid coming again to this court if any way of securing petitioners' rights could be found in the court below, petitioners did on January 2, 1930, present to Judge Bourquin formal objections reading as follows:

> "Now come the plaintiffs and object to the order made and entered in said cause on the 14th day of December, 1929, constituting a statutory court of three judges as amended by the order of December 26, 1929, vacating the decree of dismissal in said cause upon the ground and for

the reason that said order as so amended does not comply with the rule of the Supreme Court of the United States made absolute on the application to said court for a writ of mandamus in that the cause is set for final hearing and a special master is appointed to take testimony, and request is hereby made that said order of December 14, 1929, be vacated and set aside to the extent that it provides for a final hearing and for the taking of testimony."

These objections were not a motion but were simply a suggestion to Judge Bourquin that he had acted without jurisdiction and that he ought to comply with the rule made absolute by this court.

The sole result of this attempt to calm the waters was that on January 3 Judge Bourquin filed an opinion declining to grant petitioners' request. A copy of the opinion will be lodged with the clerk of this court.

As appears from the certified copy of a motion made in District Court by counsel for the Board of Railroad Commissioners the case is not at issue, for on January 3 a motion to strike parts of petitioners' bill of complaint and a motion to dismiss for want of equity were filed. When, if ever, these motions will be brought on and before whom petitioners are not advised. Presumably they will be presented to the court of three judges, but, of course, they can be withdrawn at any time and an answer filed.

We made in our motion for the issuance of a writ a point of the failure of Judge Pray to comply with the rule that he assemble the three-judge court, but we suggest in our motion that this court may treat Judge Bourquin's order assembling a three-judge court as substantial compliance with the direction to Judge Pray. Nevertheless, we doubt that an agreement between judges relative to the division of work in a judicial dis-

trict is an excuse for failure to comply with the requirement of Section 380, Title 28, U. S. C.:

> "Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a *judge, he* shall immediately call to his assistance to hear and determine the application two other judges:" (Italics supplied.)

But inasmuch as the court of three judges as constituted includes Judge Pray as a member, there may be ground for saying that there has been substantial compliance with the statute. Petitioners are concerned with substance rather than with form or technicalities and if given a hearing on their application for an interlocutory injunction, they would not have returned to this court, though the method adopted by the court below of complying with this court's rule might not be strictly in accordance with the rule and the statutes.

Petitioners' complaint is that Judge Bourquin's order of December 14 denies them a hearing on their application for an interlocutory injunction since that order sets the case down for trial on the merits. They insist, too, that Judge Bourquin had no authority in a Section 380 case to appoint a master and direct the parties to go to trial before the master prior to the convening of a three-judge court. All that is fully discussed in the brief now on file. Only a writ specifically directing Judge Bourquin and the District Court of Montana to vacate the objectionable portions of the order of December 14 can secure to petitioners an orderly hearing on their application for an interlocutory injunction.

Respectfully submitted,

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

Original ..No. 21.

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION FOR STAY ORDER AND AFFIDAVIT.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

MOTION.

Now come the petitioners in the above entitled matter and move the court and the single justice to whom this motion is presented that a Writ of Supersedeas be issued to stay the operation and effect of the order of Honorable George M. Bourquin, District Judge of the United States for the District of Montana, made and filed on the 31st day of May, 1929, dismissing the bill of complaint of the petitioners against the Board of Railroad Commissioners of the State of Montana, and Lee Dennis, Daniel Boyle and Leonard C. Young, as members of

and constituting said Board of Railroad Commissioners, and L. A. Foot, as Attorney General of the State of Montana, then pending in the District Court of the United States for the District of Montana. In the alternative petitioners pray for such other or additional Writ or order as may be just and proper in order to preserve the *status quo* in said suit in the District Court of the United States for the District of Montana until the motion now on file with this Honorable Court for leave to file a petition for a Writ of Mandamus against the Honorable George M. Bourquin, District Judge of the United States for the District of Montana and against the District Court of the United States for the District of Montana be passed upon by this Honorable Court and the right to said Writ of Mandamus be determined. This motion is based upon the verified petition for Writ of Mandamus attached to the motion for leave to file said petition and the affidavit hereto attached of Dennis F. Lyons, one of the attorneys for petitioners.

BRUCE SCOTT,
H. H. FIELD,
F. G. DORETY,
M. S. GUNN,
DENNIS F. LYONS,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

Original .....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the HONORABLE GEORGE M. BOURQUIN, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

STATE OF MINNESOTA,
County of Ramsey.—ss.

DENNIS F. LYONS, being first duly sworn, doth depose and say that he is a resident of St. Paul, Minnesota, and General Counsel of the Northern Pacific Railway Company, one of the above named petitioners. That he is one of the attorneys for petitioners in the above entitled matter and that he is familiar with all the matters set forth in the petition for a Writ of Mandamus attached to petitioners' motion for leave to file, and knows that the allegations of said petition are true.

That on Wednesday, June 5, 1929, affiant was in Helena, Montana, assisting and advising Mr. M. S. Gunn, one of the attorneys for petitioners, in the preparation of necessary papers for an application to this court for a Writ of Mandamus against the Honorable George M. Bourquin, District Judge of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

That while so engaged, Mr. Francis A. Silver, attorney for the Board of Railroad Commissioners of Montana, called Mr. Gunn on the telephone and inquired what action the railroads contemplated in view of Judge Bourquin's order of May 31st dismissing their bill of complaint. That Mr. Silver was then fully advised of the position of the petitioners that Judge Bourquin's order was wholly void and was told that a petition for a Writ of Mandamus was being drafted and would be filed as soon as possible.

That on Thursday, June 6, 1929, said Board of Railroad Commissioners wired the Traffic Department of each of your petitioners as follows:

> "The Board has not received your tariffs on petroleum and petroleum products ordered effective April 17th in re order 1533 Docket 1020. You are aware that Judge Bourquin on May 31st dismissed suit in which these rates were temporarily enjoined. Advise by wire when tariffs will be filed."

That affiant on Friday, June 7, 1929, wired said Board of Railroad Commissioners as follows:

> "Our traffic department has referred to me your telegram about tariffs on petroleum and petroleum products stop I have just arrived from Helena where I spent Wednesday with local counsel preparing papers for filing in United States Supreme Court to determine right of Judge Bourquin to dismiss our bill stop It is our contention

that the restraining order is still in full force and effect and that the order of Judge Bourquin is wholly void stop Our plan of procedure and our theory of the law were outlined to your Counsel Mr. Silver on Wednesday stop Papers will be filed in Supreme Court Monday stop We desire to get a speedy and orderly decision of this matter believing this to be in the best interest of all parties to the case stop Copies of papers will be sent to your counsel and we shall be glad to have his cooperation which will be very effective to secure an early hearing on our petition for mandamus."

That affiant understands that the other petitioners all advised said Board of Railroad Commissioners that mandamus proceedings were being instituted in this court and that for that reason they did not intend to file new tariffs.

That affiant is informed and believes that later in the day of June 7, 1929, the Board of Railroad Commissioners of Montana wired the Sunburst Oil Company, a shipper of petroleum and petroleum products as follows:

"Rates prescribed in our order fifteen thirty three are now in effect in our opinion any carrier demanding or receiving a greater charge is guilty of extortion in violation section thirty eight naught four revised codes."

That as set forth in the petition for a Writ of Mandamus Section 3804 provides penalties of not less than five hundred dollars nor more than two thousand dollars for each offense. That said Board of Railroad Commissioners threaten and will bring numerous actions against petitioners to recover penalties under Section 3804 and other sections of the Montana Revised Code, and will advise and encourage shippers generally throughout the State of Montana to refuse to pay existing tariff rates

on petroleum and petroleum products and to tender only rates prescribed in the Commission's order No. 1533.

That on Monday, June 10th, after petitioners had filed with this Court their Motion for Leave to File a Petition for a Writ of Mandamus, petitioners applied to said Honorable George M. Bourquin, District Judge, to stay his order of May 31, 1929 dismissing plaintiffs' Bill of Complaint, and to stay the operation and effect thereof, until said mandamus proceedings which he was advised had been instituted in this Court had been determined. That said District Judge Bourquin refused to grant a stay and upon being requested to note his refusal on the form of stay order presented to him, noted on said order, "Case dismissed there is nothing to stay. Denied. Bourquin, J."

DENNIS F. LYONS.

Subscribed and sworn to before
me this 11th day of June, 1929.

G. T. C. PETERSON,
Notary Public, Ramsey County, Minn.
My commission expires Oct. 21, 1935.
(Notarial Seal)

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CHARLES E

IN THE

Supreme Court of the United States

21 Original.....

IN THE MATTER OF THE PETITION OF NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, for a Writ of Mandamus against the Honorable George M. Burquin and the Honorable Charles N. Pray, District Judges of the United States for the District of Montana, and against the District Court of the United States for the District of Montana.

RETURN TO RULE TO SHOW CAUSE

L. A. FOOT, Attorney General,
Helena, Montana.

FRANCIS A. SILVER, Counsel,
Board of Railroad Commissioners
of the State of Montana,
Helena, Montana.
Attorneys for Respondents.

IN THE

Supreme Court of the United States

EX PARTE: In the Matter of Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al, Petitioners.

RETURN TO RULE TO SHOW CAUSE.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The return of the DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA, the Honorable George M. Bourquin and the Honorable Charles N. Pray, judges thereof, to the RULE TO SHOW CAUSE issued out of the above entitled court in the above entitled cause on the 14th day of October, 1929, respectfully represents and shows to the Court as follows:

That the respondent DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA embraces within its jurisdiction the whole of the State of Montana; that heretofore, to-wit: on September 8, 1912, by an order duly given, rendered and made, the said District Court of the United States for the District of Montana adopted and published rules of court, dividing the said District of Montana into five divisions, as follows: Butte, Helena, Great Falls, Missoula and Billings Divisions, and requiring that all causes filed in the said United

States District Court, District of Montana, should be assigned to the divisions of the District wherein they properly belong by conformity to the laws of the State of Montana governing the place of trial in the courts thereof, which said rules were in effect at all times herein mentioned; that immediately following the appointment and qualification of Respondent Charles N. Pray as additional judge of and for the District of Montana, by an agreement duly made and entered into between the Respondent George M. Bourquin and the Respondent Charles N. Pray, as judges of said District of Montana, the five divisions of said District of Montana, created as aforesaid, were allotted to each of said judges as follows, to-wit: to said George M. Bourquin, the Butte, Helena and Missoula Divisions of said District of Montana, and to said Charles N. Pray, the Great Falls and Billings Divisions of said District of Montana, with the exclusive right in each of said judges to preside over all matters and proceedings arising in the said divisions of said court allocated to each of said judges, respectively, subject, however, to the right of either of said judges to preside in divisions allotted to said other judge upon the request of said other judge and in case of inability of the presiding judge to act by reason of disqualification, illness, or other cause, and subject, further, to the right of either of said judges, in the absence from the District of Montana of the other judge, to act in the place and stead of said absent judge during the absence of said judge from the District of Montana, and that his agreement and arrangement is now and at all times hereinafter mentioned was in full force and effect and has been at all times fully and duly observed by said George M. Bourquin and said Charles N. Pray.

That the Helena Division of said District of Montana, established as aforesaid, is composed of various counties including the county of Lewis & Clark, in which is located the City of Helena, Montana, capitol of the State of Montana, and official residence of the Board of Railroad Commissioners of the State of Montana, the members thereof, and the Attorney General of the State of Montana.

That on the 15th day of April, 1929, and at a time when the said George M. Bourquin was absent from the District of Montana on official business, the Northern Pacific Railway Company, a corporation, and others, petitioners in the above entitled proceeding, commenced an action in the said United States District Court for the District of Montana against the Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle, and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners of the State of Montana, and L. A. Foot, as Attorney General of the State of Montana, by the filing of a Bill of Complaint in the office of the Clerk of the United States District Court, District of Montana, at Great Falls, Montana, a copy of which said Bill of Complaint is hereto attached, marked Exhibit A and by this reference made a part hereof; that by reason of the official residence of the defendants, as above set forth, and the rules of court above mentioned, the said proceeding, filed as aforesaid, belonged to the Helena Division of said District of Montana and the said Clerk docketed said proceeding in the said Helena Division; that said proceeding bears Equity No. 692 of the Civil files of the said Helena Division of said District of Montana and that said proceeding, instituted as aforesaid, has been at all times since said 15th day of April, 1929, and now is, pending in

the Helena Division of the said District Court of the United States, District of Montana, and before the said George M. Bourquin, as judge thereof.

That on the said 15th day of April, 1929, the said Charles N. Pray, acting in the place and stead of said George M. Bourquin, then and there absent from the District of Montana, upon motion of plaintiffs in said action, issued a temporary restraining order against the defendants above mentioned, a copy of which said restraining order is attached hereto, marked Exhibit B and by this reference made a part hereof.

That thereafter and on or about the 6th day of May, 1929, the defendants in said action served on plaintiffs and filed in said proceeding their certain several motions to dismiss said Bill of Complaint and to dissolve said temporary restraining order, copies of which said motions are hereto attached, marked Exhibits C and D, respectively, and by this reference made a part hereof; that thereafter, and on the..... day of May, 1929, said George M. Bourquin returned to the District of Montana; that thereafter, and on the 23d day of May, 1929, the defendants in the said proceeding served upon the plaintiffs therein a written notice advising said plaintiffs that the said motion to dissolve the temporary restraining order had been set for hearing and would be heard before the said George M. Bourquin at Butte, Montana, on the 28th day of May, 1929, copy of which said notice is hereto attached, marked Exhibit E, and by this reference made a part hereof.

That on the 28th day of May, 1929, at the hour appointed in said notice, to-wit: 9:30 A. M., the said Motion to Dissolve said Temporary Restraining Order came regularly on for hearing before said George M. Bourquin in the court-

room of said United States District Court, District of Montana, at Butte, Montana, plaintiffs and defendants being present through counsel; that plaintiffs did not then and there or at any other time in the said United States District Court for the District of Montana, interpose any objection to the said George M. Bourquin presiding and acting in said proceeding, filed as aforesaid, but plaintiffs did object to the court hearing the said motion to dissolve said temporary restraining order on the ground that by virtue of Section 266, Judicial Code (Sec. 380, 28 U. S. C. A.), it was beyond the jurisdiction of the court, composed of one judge, to dissolve said restraining order; that upon said hearing, arguments were presented by defendants' counsel to the Court and to the said George M. Bourquin in behalf of each of the grounds set forth in the said motion to dissolve and particularly in behalf of the first ground of said motion to dissolve, to-wit that the said Bill of Complaint, upon the allegations of which said temporary restraining order was issued, does not state facts sufficient to constitute a valid cause of action in equity, or at all, and, likewise, counsel for plaintiffs presented arguments in opposition to the grounds set forth and argued, whereupon the said matter was by the said Court and said George M. Bourquin, as judge thereof, taken under advisement, and the said court and said George M. Bourquin, being fully advised in the premises, thereafter and on May 31, 1929, sustained the defendants' contention that the Bill of Complaint did not and does not state facts sufficient to constitute a valid cause of action in equity, or at all, and there being then and there pending before the court and the said George M. Bourquin, as judge thereof, a motion to dismiss the said Bill of Complaint on the ground that

the same did not state facts sufficient to constitute a valid cause of action in equity, or at all, which said motion had been duly served upon plaintiffs, as above alleged, the said Motion to Dismiss the Bill of Complaint, was by the said Court and George M. Bourquin, as judge thereof, granted, a copy of said decision of May 31, 1929, being attached hereto, marked Exhibit F and by this reference made a part hereof; that thereafter, and on said 31st day of May, 1929, an order of said court was duly entered in the minutes of said court dismissing the said Bill of Complaint, a copy of said minute entry being attached hereto, marked Exhibit G, and by this reference made a part hereof.

WHEREFORE, respondents respectfully pray that the RULE TO SHOW CAUSE be discharged.

DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MONTANA,

GEORGE M. BOURQUIN,
Judge of the District Court of the United States for the District of Montana.

CHARLES N. PRAY,
Judge of the District Court of the United States of the District of Montana,

Respondents.

L. A. FOOT, Attorney General,
Helena, Montana,
FRANCIS A. SILVER, Counsel,
Board of Railroad Commissioners,
Helena, Montana,
Solicitors for Respondents.

EXHIBIT A.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
.....DIVISION

Northern Pacific Railway Company, Great Northern Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company and Chicago, Burlington & Quincy Railroad Company,

Plaintiffs,

vs.

Board of Railroad Commissioners of the State of Montana and Lee Dennis, Daniel Boyle, and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners, and L. A. Foot as Attorney General of the State of Montana,

Defendants.

BILL OF COMPLAINT

To the Honorable, the Judges of the District Court of the United States for the District of Montana:

Northern Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, Great Northern Railway Company, a corporation created and existing under and by virtue of the laws of the State of Minnesota, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Wisconsin, and Chicago, Burlington & Quincy Railroad Company, a corporation created and existing under and by virtue of the laws of the State of Illinois, bring this their bill of complaint against Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, citizens of the State of Montana and residents within the said district and thereupon complain and allege:

I.

This is a suit arising under the Constitution and Laws of the United States, particularly under the Commerce Clause of the Constitution and the Fourteenth Amendment thereof, and the Act of Congress known as the Interstate Commerce Act, and involves, exclusive of interest and costs, over three thousand dollars as between each one of the plaintiffs and said defendants. The plaintiffs sue in their own behalf and in behalf of all railroad companies similarly situated for the reason, among others, that much of the business hereinafter described is competitive and must be done by all the carriers at the same rate.

II.

The defendants, Lee Dennis, Daniel Boyle and Leonard C. Young are members of and constitute the Board of Railroad Commissioners of the State of Montana, and under the general statutes of the state are charged with the duty of enforcing the state laws and statutes applicable to railway companies. The defendant, L. A. Foot, is Attorney General of the State of Montana and is charged with the duty, under the general statutes thereof, of acting as counsel for said Board of Railroad Commissioners with the duty of assisting them in the enforcement of the laws and statutes and orders of the Board of Railroad Commissioners applicable to railway companies.

III.

Among the powers entrusted to said Board of Railroad Commissioners by the laws of the State of Montana, and particularly by Chapter 37, Session Laws, 1907 (Chapter 257, Sections 3779-3847, Revised Codes of Montana, 1921), is the power to fix rates and charges for the transportation of freight within the State of Montana. The Board is required to fix rates that are just and reasonable and nondiscriminatory and it may fix different rates for different roads or for different parts of the same road and may alter or amend any rate previously established by it. Any

failure or refusal by any railroad company to comply with the provisions of Section 3795, Revised Codes of Montana, 1921, shall subject such railroad to a penalty of not less than one hundred dollars or more than five hundred dollars for each day that such failure or neglect is continued. It is the duty of the Board to see that violations are promptly prosecuted and penalties due the state recovered and collected. The Board is required to request the Attorney General to institute proper proceedings to recover penalties.

IV.

In October, 1928, said Board, acting on its own motion, conducted a general inquiry under its Docket No. 1020 into the reasonableness of existing rates on petroleum and petroleum products. Subsequently and on the 18th day of March, 1929, the Board made and filed its report and order No. 1533. In this report existing intrastate rates on petroleum and petroleum products were found unreasonable and an order was made by the Board prescribing a new scale of rates to take effect April 17, 1929. Plaintiffs seek to enjoin defendants from putting into effect and enforcing the new scale of rates.

V.

Montana is an oil-producing state. Crude oil is produced at several points in Montana and there are a number of refineries within the state. These wells and refineries do not take care of the entire domestic consumption. In 1927, for example, the last year for which figures are available, 53,000,000 gallons of gasoline were consumed in the state, of which 33,000,000 gallons were produced in Montana and 20,000,000 gallons in other states. In that same year about 3,000,000 gallons of Montana gasoline were sold outside of the state.

At Greybull and Casper, Wyoming, on the line of the plaintiff, Chicago, Burlington & Quincy Railroad Company,

are refineries which ship large quantities of petroleum products to points in the State of Montana.

Oil produced in California moves by tank steamers to points on the North Pacific Coast and thence by rail to points in Washington, Idaho and Montana.

VI.

Interstate rates and intrastate rates on petroleum and petroleum products in Wyoming, Montana, Idaho and Washington are inter-related and inter-dependent. The existing scale of rates on petroleum and petroleum products in Montana is the so-called Montana distributing scale established in 1922 in the proceeding, In Re Montana Petroleum Products, reported in 15 Montana Utility Reports, 36. The scale is based upon the fifth class scale prescribed by the Interstate Commerce Commission in Portland Chamber of Commerce v. O. R. R. & N. Co., 21 I. C. C. 640, in which case the interstate Commerce Commission fixed a basis of class rates for application from North Pacific Coast terminals, such as Portland, Seattle and Tacoma, to Washington, Idaho and Montana. This class-rate scale has been prescribed by the Interstate Commerce Commission for application from Portland to California points and recently from Arizona to California and New Mexico and El Paso, Texas.

Existing rates on petroleum and petroleum products from Greybull, Wyoming, to Montana points are on the basis of the Montana distributing scale. Rates from Casper, Wyoming, were established by order of the Interstate Commerce Commission on the basis of the Montana distributing scale as maximum. This was done in the case of Texas Company v. C. B. & Q. R. R. Co., 101 I. C. C. 734.

Rates for the shipment of petroleum and petroleum products within the State of Washington and from points in Washington to points in Idaho and Montana are also the same as the Montana distributing scale.

Any change in the Montana distributing scale would

upset a well-established rate structure that covers a number of states and would directly affect rates on interstate commerce. The establishment of an unreasonably low Montana scale would directly burden and discriminate against interstate commerce and would discriminate against localities in adjoining states from which shipments of petroleum and petroleum products are made to points in the State of Montana.

VII.

The existing scale of interstate rates from Casper, Wyoming, to Montana points which, as above stated, is the Montana distributing scale, has been found reasonable by the Interstate Commerce Commission. When the Casper rates were under consideration by that Commission and it was claimed that Casper was being discriminated against because at that time its rates into Montana average 22.5c higher than rates from Greybull to Montana points, inasmuch as Greybull at that time did have the benefit of the Montana scale, the Interstate Commerce Commission in Texas Company v. C. B. & Q. R. R. Co., 101 I. C. C. 734, expressly found that the Casper rates were not unreasonable but found that they were prejudicial to Casper and preferential to Greybull. The Montana rates were then put into effect as maxima from Casper to Montana points. This was an authoritative finding by the Interstate Commerce Commission that interstate rates higher than the existing Montana distributing scale were reasonable per se and would have been continued in effect if undue discrimination had not been found. This is the only finding of the Interstate Commerce Commission that directly relates to the Montana distributing scale. Lower rates from Great Falls, Lewistown and Miles City refineries to a few consuming points in western South Dakota were established by the Interstate Commerce Commission in Midcontinent Oil Rates, 139, I C. C. 605, but these rates are the result of peculiar competitive conditions that do not exist in

the territory under consideration and they are no measure of proper rates for the State of Montana.

VIII.

The general investigation of rates on petroleum and petroleum products by the Montana Board of Railroad Commissioners was not undertaken at the request of any railroad and no testimony was given at the hearing that the present rate relationship was unsatisfactory. The Montana Commission proceeded with complete knowledge and appreciation of the fact that if it lowered the Montana scale of rates, interstate rates would be affected. Shippers of oil from Wyoming to Montana appeared in the investigation and testified that if the Montana scale were lowered they would expect the rates from Wyoming to Montana to be reduced. Since the publication of the Board's order establishing a lower scale these Wyoming Shippers have demanded lower rates from plaintiffs so that they might be on the same competitive basis as Montana producers. Similar rate adjustments will probably be demanded by shippers from North Pacific Coast points.

IX.

The order of the Montana Commission if made effective will establish a scale of rates that averages 29% lower than the existing scale. Compliance with this scale would cut the intrastate revenues of plaintiffs more than $400,000 annually and through resulting depression of interstate rates would lower the total revenues of plaintiffs considerably more.

This order of the Montana Commission is violative of paragraph (4) of Section 13 of the Interstate Commerce Act (Act of Congress of February 4, 1887, as amended by Act of June 18, 1910, and Act of February 28, 1920) which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand,

or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

X.

In order that the question whether an intrastate rate does in fact discriminate against persons or localities in interstate commerce or against interstate commerce itself may be determined, Congress has provided an orderly procedure before the Interstate Commerce Commission commonly referred to as a Section 13 case (Section 13 of Interstate Commerce Act of February 4, 1887, as amended by Act of June 18, 1910, and Act of February 28, 1920). Plaintiffs have applied to the Interstate Commerce Commission to proceed under said Section 13 to determine whether or not said proposed reduced Montana scale does not discriminate against persons and localities in interstate commerce and against interstate commerce, and have alleged in their petition that the proposed scale does discriminate against persons and localities in interstate commerce and does discriminate against interstate commerce, and ask in said petition that the Interstate Commerce Commission institute an early investigation with respect to the matters and things set forth in the petition. The Interstate Commerce Commission will undoubtedly, in accordance with its usual practice, set the matter down for hearing at which time all interested parties can appear and present evidence, and all the facts as to both interstate and intrastate commerce can be submitted to the body which under the Constitution and laws of the United States has authority to determine these questions.

If the new Montana scale is permitted to go into effect April 17, 1929, and continue in effect during the time that will elapse before a decision can be obtained from the Interstate Commerce Commission, which period of time plaintiffs allege will be approximately a year, plaintiffs will suffer irreparable loss and injury if the proposed Montana scale be ultimately found unlawful by the Inter-

state Commerce Commission. There is no way in which plaintiffs could recover the sums lost because of the unreasonable and unlawful intrastate rates.

To avoid such irreparable loss and damage and to maintain the status quo during the time necessary to hear and determine plaintiffs' Section 13 case plaintiffs asked the Montana Commission to suspend the proposed rates and extend the effective date of the Commission's order until the Interstate Commerce Commission has acted. This the Montana Board of Railroad Commissioners late on April 13, 1929, refused to do, although Section 13 of Chapter 37 of Montana Session Laws, 1907 (Sec. 3794, Revised Codes of Montana, 1921), provides that:

> "* * * and in proper cases, where it appears that the United States Inter-State Commerce Commission Law has been violated, it is hereby made the duty of said Board to make complaint to the Inter-State Commerce Commission of the United States and to aid such Commission in any investigation it may make concerning violations of the United States Law, by furnishing evidence, and in any other manner which may seem best suited to enforce both the United States and State Law, and to protect the interests of the people."

XI.

The defendants threaten and intend after the 17th day of April, 1929, to commence numerous proceedings and prosecutions both for equitable or mandatory or other relief and for a multiplicity of penalties in order to force the plaintiffs and other carriers similarly situated to charge and collect the new scale of rates unless plaintiffs voluntarily file new tariffs and put the new rates into effect. The proceedings contemplated and threatened by said defendants will subject plaintiffs and other carriers similarly situated to multitudinous and vexatious suits both for injunctive or mandatory and other relief and for fines and penalties, and would, if such proceedings be permitted, prevent the plaintiffs, their officers and employes from obey-

ing the mandate of the Interstate Commerce Act against unlawful discriminations and would directly interfere with and burden interstate commerce. Plaintiffs allege that the penalties for failure to put the new rates into effect are so severe as to compel compliance though plaintiffs are convinced such rates will ultimately be found unlawful; that said penalties are so large as to deny plaintiffs the equal protection of the law and deprive them of their property without due process of law. Plaintiffs allege that they are without adequate remedy at law.

Wherefore, inasmuch as the plaintiffs are remediless by the strict rules of the common law and only relievable in equity, the plaintiffs pray:

That the defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, be required to make full and direct answer to this bill of complaint (but not under oath, answer under oath being expressly waived);

That defendants, Lee Dennis, Daniel Boyle and Leonard C. Young, constituting the Board of Railroad Commissioners of the State of Montana, be enjoined and restrained from putting into effect said Report and Order No. 1533 and the scale of rates provided in the Report and Order of said Board, and that said defendants be required to suspend said rates and any tariffs prescribing said rates;

That defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, be enjoined and restrained from bringing any action or proceeding of any sort whatsoever to enforce said new scale of rates or to hinder or obstruct or prevent the charge and collection by plaintiffs and other carriers similarly situated of the existing scale of rates;

That said defendants be so enjoined and restrained until and only until the Interstate Commerce Commission has determined the Section 13 case brought by plaintiffs herein unless it be determined in said proceeding by the Interstate Commerce Commission that the proposed scale of rates would unlawfully discriminate against interstate commerce or persons or localities in interstate commerce and

direct the establishment or permit the establishment of intrastate rates on a higher basis than the proposed scale, in which event plaintiffs pray that said defendants be perpetually enjoined and restrained from enforcing the scale of rates provided in said Order No. 1533;

That a temporary restraining order be issued during the pendency of this action restraining the defendants and each of them as prayed;

That plaintiffs have such other and further relief in the premises as the nature of the case shall require and to Your Honors shall seem meet; and may it please Your Honors to grant also to plaintiffs a writ of subpoena to be directed to said defendants, Lee Dennis, Daniel Boyle, Leonard C. Young and L. A. Foot, and each of them, commanding them and each of them to appear and make answer to plaintiffs' bill of complaint at a certain time and to abide the further order of the court.

Dated April 13th, 1929.

NORTHERN PACIFIC RAILWAY COMPANY,
By F. J. GEHAN,
M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

GREAT NORTHERN RAILWAY COMPANY,
By W. L. CLIFT,
R. J. HAGMAN,
Solicitors.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
By MURPHY & WHITLOCK,
HOWARD TOOLE,
Solicitors.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By M. S. GUNN, CARL RASCH and E. M. HALL,
Solicitors.

STATE OF MINNESOTA, }
County of Ramsey. } ss.

B. W. SCANDRETT, being duly sworn, deposes and says he is Vice President of the Northern Pacific Railway Company, one of the plaintiffs in the above entitled bill of complaint; that he has read the foregoing bill of complaint and knows the contents thereof; that the allegations of the same are true to his own knowledge, except as to matters expressly stated therein on information and belief, and as to those matters he believes it to be true.

B. W. SCANDRETT.

Subscribed and sworn to before me this 13th day of April, 1929.

G. T. C. PETERSON,
Notary Public, Ramsey County,
(Notarial Seal) Minnesota. My Commission expires October 21, 1935.

EXHIBIT B

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
.....DIVISION

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND LEE DENNIS, DANIEL BOYLE, AND LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

TEMPORARY RESTRAINING ORDER

The plaintiffs having filed their verified bill of complaint in the above entitled case praying that the defendants be enjoined from putting into effect the report and order No. 1533 dated March 18, 1929, of the Board of Railroad Commissioners of the State of Montana in Docket No. 1020 and the new scale of rates on petroleum and petroleum products prescribed in said report and order, and from bringing any action or proceeding to enforce said order and scale of rates, or to hinder or prevent plaintiffs from charging and collecting the existing scale of rates, and plaintiffs having presented to the undersigned District Judge of the United States District Court their application for an interlocutory injunction on the ground that said report and order are in conflict with the Commerce Clause and the Fourteenth Amendment of the Federal Constitution and the Act to Regulate Commerce, and having requested the undersigned Judge of the United States District Court as provided by statute to call to his assistance two other judges to hear and determine said application, and having requested that a temporary restraining order be issued pending the hearing and determination of the application for an interlocutory injunction, and it now appearing that irreparable loss and damage would result to the plaintiffs unless such temporary restraining order be granted in that the plaintiffs and other railway companies similarly situated would be complying with said report and order be deprived of their property and a burden be placed upon interstate commerce and localities and persons in interstate commerce, or by failure to comply with said report and order the plaintiffs and other railway companies similarly situated and agents, officers and employes would be subjected to multitudinous suits, both for injunctive and mandatory or other relief and for fines and penalties and it appearing further that if such temporary restraining order is not granted said plaintiffs will be injured in the manner above stated and this temporary restraining order

should be granted without notice for the reason that otherwise plaintiffs will be required to establish and maintain the reduced rates ordered by the said Board on the 17th day of April, 1929, and suffer the irreparable damage above referred to before notice could be given of the application for a temporary restraining order.

IT IS THEREFORE HEREBY ORDERED, that the said Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle and Leonard C. Young, as members of said Board and each of them, be temporarily restrained until the plaintiffs' application for an interlocutory injunction be heard and determined by three judges, as provided by statute, from puting into effect said report and order No. 1533 and the scale of rates provided in said report and order, and that said defendant L. A. Foot, as attorney General of the State of Montana, be similarly temporarily restrained from bringing any action or proceeding of any sort whatsoever to enforce said new scale of rates, or to hinder or obstruct or prevent the charge and collection by plaintiffs and other carriers similarly situated of the existing scale of rates on petroleum and petroleum products within the State of Montana;

IT IS FURTHER ORDERED that a copy hereof be served upon each of the defendants and that from and after the date of service each and all of said defendants shall observe and comply herewith;

AND IT IS FURTHER ORDERED that this temporary restraining order shall become effective as to the plaintiffs herein upon the filing of bonds in favor of the United States of America, as follows, to-wit:

By the Northern Pacific Railway Company in the penal sum of Fifteen Thousand ($15,000.00) Dollars;

By the Great Northern Railway Company in the penal sum of Fifty Thousand ($50,000.00) Dollars;

By the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in the penal sum of Thirty Thousand ($30,000.00) Dollars; and

By the Chicago, Burlington & Quincy Railroad Company in the penal sum of Ten Thousand ($10,000.00) Dollars; and any other carrier similarly situated, upon the filing of a bond in the penal sum of Ten Thousand ($10,000.00) Dollars, such bonds to be conditioned that the plaintiffs, or other carriers, shall pay all damages caused by it by reason of the issuance of this order in the event it should eventually be decided that said order was unlawfully issued.

Dated at Great Falls, Montana, this 15th day of April, 1929.

CHARLES N. PRAY,
District Judge of the United States.

EXHIBIT C
DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION
IN EQUITY NO. 692

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND LEE DENNIS, DANIEL BOYLE, AND LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

MOTION TO DISMISS BILL OF COMPLAINT

Come now the Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle and Leonard

Young, as members of and constituting said Board of Railroad Commissioners of the State of Montana, and L. A. Foot, as Attorney General of the State of Montana, defendants above-named, and move the Court to dismiss the bill of complaint on file herein on the ground and for the reasons that the said Bill of Complaint does not state facts sufficient to constitute a valid cause of action, in equity, or at all.

L. A. FOOT,
Attorney General of the State of Montana, residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana, residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 6th day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Attorneys for Northern Pacific Ry. Co., and Chicago, Burlington & Quincy R. Co.

EXHIBIT D

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION
IN EQUITY NO. 692

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE ST. PAUL AND PACIFIC RAILROAD COM-

PANY AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND LEE DENNIS, DANIEL BOYLE, AND LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, AND L. A. FOOT as Attorney General of the State of Montana,

Defendants.

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the Board of Railroad Commissioners of the State of Montana, Lee Dennis, Daniel Boyle, and Leonard C. Young, as members of and constituting said Board of Railroad Commissioners of the State of Montana, and L. A. Foot, as Attorney General of the State of Montana, and move the court to dissolve and set aside the Temporary Restraining Order issued and filed in the above entitled court and cause on April 15, 1929, on the grounds and for the following reasons, to-wit:

I.

The Bill of Complaint herein, upon the allegations of which said Temporary Restraining Order was issued, does not state facts sufficient to constitute a valid cause of action in equity, or at all.

II.

The Bill of Complaint herein is not verified as required by Rule No. 25 of the Equity Rules promulgated for all Federal Courts by the Supreme Court of the United States, in that said Bill of Complaint is verified in part upon information and belief.

III.

That the above-entitled court did not at the time of the

issuance of the said Temporary Restraining Order, or at any other time, or at all, set the matter of the issuance of a preliminary injunction down for hearing at a date within ten days from date of issuance of said order to-wit: April 15, 1929, as required by Rule No. 73 of the Equity Rules promulgated for all Federal Courts by the Supreme Court of the United States.

IV.

That the above-entitled court did not at the time of the issuance of said Temporary Restraining Order, or at any other time, or at all, set the matter of the issuance of a preliminary injunction down for hearing at a date certain as is required by Section 718, Revised Statutes of the United States, as amended, (28 U. S. C. A. 381).

V.

That the above-entitled court did not at the time of the issuance of said Temporary Restraining Order, or at any other time, or at all, issue an order requiring the defendants or either of them to show cause before the Court why a preliminary injunction should not be granted and that without the issuance of such an order to show cause the above court was without authority to issue the aforesaid Temporary Restraining Order.

VI.

That the portion of the Temporary Restraining Order restraining the defendants and each of them from putting into effect Report and Order No. 1533 "until the plaintiffs' application for an interlocutory injunction may be heard and determined by three judges, as provided by statute," is in excess of jurisdiction and void in that the same is contrary to the provisions of Section 718, Revised Statutes of the United States, as amended, (28 U. S. C. A. 381).

VII.

That no extension of the terms of the Temporary Restraining Order has been granted by the above-entitled court

for good cause shown or at all and more than ten days has elapsed since the issuance and entry of said Temporary Restraining Order.

This motion is based upon the records, files, and minutes of the court in the above-entitled cause.

Dated at Helena, Montana, this sixth day of May, 1929.

L. A. FOOT,
Attorney General of the State of Montana, residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana, residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing motion to dismiss admitted and receipt of a copy thereof acknowledged this 6th day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Solicitors for Northern Pacific Ry. Co., and Chicago, Burlington & Quincy R. Co.

EXHIBIT E

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MONTANA
HELENA DIVISION
EQUITY NO. 692

NORTHERN PACIFIC RAILWAY COMPANY, GREAT NORTHERN RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Plaintiffs,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA AND LEE DENNIS, DANIEL

BOYLE AND LEONARD C. YOUNG, as members of and constituting said BOARD OF RAILROAD COMMISSIONERS, and L. A. FOOT as Attorney General of the State of Montana,

Defendants.

NOTICE OF HEARING UPON MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

To the Northern Pacific Railway Company,
Great Northern Railway Company,
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, and
Chicago, Burlington and Quincy Railroad Company, plaintiffs above-mentioned, and their respective attorneys:

You, and each of you, will please take notice that the motion of the defendants herein to dissolve the temporary restraining order, issued and filed in the above-entitled court and cause on April 15, 1929, has been set down for hearing, and will be heard before the Honorable [illegible]o. M. Bourquin, Judge of the above-entitled court, at the Court House, Federal Building, Butte, Montana, on Tuesday, the 28th day of May, 1929, at the hour of 9:30 o'clock A. M.

Dated at Helena, Montana, this 23d day of May, 1929.

L. A. FOOT,
Attorney General of the State of Montana, residing at Helena, Montana.
FRANCIS A. SILVER,
Attorney for the Board of Railroad Commissioners of the State of Montana, residing at Helena, Montana.
Attorneys for Defendants.

Service of the above and foregoing notice of hearing upon Motion to Dissolve Temporary Restraining Order, and receipt of a copy thereof acknowledged this 23 day of May, 1929.

GUNN, RASCH, HALL & GUNN,
Attorneys for Northern Pacific Railway Company, and Chicago, Burlington & Quincy Railroad Company.

EXHIBIT F
UNITED STATES DISTRICT COURT, MONTANA

Northern Pacific Ry. Co., et al.,
Plaintiffs,

vs.

Board of Railroad Commissioners, et al.,
Defendants.

No. 692

The four railways plaintiffs in their complaint so far as vital allege that defendants ordered certain intrastate freight rates reduced 29% and which would reduce plaintiffs' revenues more than $400,000 annually; that the change will "upset a well-established rate-structure * * * and would directly affect rates on interstate commerce. The establishment of an unreasonably low Montana scale would directly burden and discriminate against interstate commerce and would discriminate against localities in adjoining states"; that the order "is violative of paragraph 4 of Section 13 of the Interstate Commerce Act, which expressly forbids and declares unlawful any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce"; that plaintiffs have applied to the Interstate Commerce Commission to determine whether or not the reduced rates "does not discriminate," and in their petition have alleged "that the proposed scale does discriminate"; that if the Commission determines that

the proposed scale is "unlawful", plaintiffs in the mesne time will suffer irreparable loss and injury unless the status quo be maintained by injunction.

Although presented to the court two days before the defendants' order became effective, no notice of the application for a temporary restraining order was given, but such order issued.

Defendants now move to dismiss the complaint and to dissolve the order, for that amongst other grounds the complaint does not state sufficient facts to constitute a valid cause of action in equity. That it does not is very clear.

The statute (paragraph 4, Section 13, Title 49, U. S. C. A.) forbids not burdens and discriminations in respect to interstate commerce and localities, but only "undue, unreasonable or unjust discrimination"; and the latter differ from the former as night from day, as unlawful from lawful.

Reading the complaint in the light of common sense as well as settled rules of pleading, it is plain the plaintiffs plead no facts disclosing and make no charge that the proposed scale will cause any the discrimination by the staute forbidden. That plaintiffs will lose revenue and interstate rates require readjustment, may be consequence of any intrastate reduction, however lawful as they are presumed to be.

Those who would procure from this court an injunction to paralyze the official arm of a sovereign state, must in pleading and proof make it plain that they are entitled to such an extraordinary and drastic remedy; and even railroad companies must proceed as the statute directs, must comply with vital rules of pleading. Not inference, intimation or suggestion will suffice, but only direct and definite averment.

The allegation that the order "is violative" of the statute is the pleaders' mere legal conclusion without any facts alleged to support it.

As the motion to dismiss must be granted, other aspects of the suit argued, need no present consideration. Dismissed.

May 31, 1929.

BOURQUIN, Judge.

EXHIBIT G

IN THE DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE
DISTRICT OF MONTANA

NO. 692

Northern Pacific Ry. Co. et al.,

vs.

Board of Railroad Commissioners, et al.

This cause heretofore duly heard and submitted to the court on defendant's motion to dissolve the temporary restraining order herein, came on regularly this day for the judgment and decision of the court, whereupon, after due consideration, court filed its written decision and ordered that the Bill in Equity herein be and hereby is dismissed.

Entered in open court this 31st day of May, A. D. 1929.

C. R. GARLOW, Clerk.